LIM CHON BENG

v.

PULAU KEMBAR SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 1-22-11-2004]
8 MARCH 2005

CIVIL PROCEDURE: *Summary judgment - Application for - Matters to be considered - Whether plaintiff's claim plain and obvious - Whether there were triable issues - Rules of the High Court 1980, O. 81*

CONTRACT: *Breach - Time of the essence - Whether constituted a fundamental breach of agreement - Whether defendant repudiated agreement - Whether plaintiff entitled to rescind agreement - Contracts Act 1950, s. 40*

CIVIL PROCEDURE: *Appearance - Unconditional appearance - Effect of - Whether defendant waived any irregularity in proceedings*

This was an application by way of summons in chambers by the plaintiff for summary judgment under O. 81 of the Rules of the High Court 1980. By virtue of a written agreement dated 14 September 1996, the plaintiff had purchased a shop-lot from the defendant, a housing developer, at a price of RM590,800. To date, the defendant had still not completed the construction of the property despite the fact that the plaintiff, as at 10 June 1999, had paid the defendant a total sum of RM295,400 as progress payments towards the purchase price. Despite numerous enquiries, the plaintiff received no response from the defendant and eventually informed the defendant by written notice that the agreement was deemed terminated through the defendant's own repudiation. The plaintiff then filed this originating summons seeking, *inter alia:* (a) a declaration that the plaintiff had rightly terminated the agreement or that the agreement had been rescinded through the defendant's repudiation; (b) refund of the sum of RM295,400 paid by the plaintiff by way of progress payments towards the purchase price; (c) liquidated damages of RM146,000.43, being 10% interest on the purchase price as calculated from the completion date to the date of rescission; and (d) post-rescissionary damages.

Held (partially allowing the application):

[1] The defendant, having entered an unconditional appearance, was precluded from raising any objection based on the plaintiff's *locus standi* herein. (p 29 c)

[2] The defendant's failure to deliver the property to the plaintiff within the time expressly stated to be of the essence clearly constituted a fundamental breach of the agreement, which brought about the defendant's repudiation of the agreement, thereby entitling the plaintiff to the remedy of rescission of the agreement. Section 40 of the Contracts Act 1950 was applicable in the instant case since the plaintiff had not signed his acquiescence in its continuance. On the contrary, the plaintiff had, by way of the final letter dated 9 June 2003, informed the defendant that the agreement was deemed terminated through the defendant's own repudiation. In the circumstances, the plaintiff was entitled to rescind the agreement. (pp 30 c, 31 e & 32 c)

[3] Bearing in mind that the instant application was for summary judgment, which was only to be entered in the absence of a triable issue or where the plaintiff's claim was plain and obvious, the plaintiff's quantification of liquidated damages based on the entire purchase price was highly arguable as the plaintiff had not effected payment thereof, but merely RM295,400, which was 50% of it. Thus, whether or not the plaintiff was entitled to claim 10% interest on the entire purchase price when he had only paid half of it was clearly a triable issue. In other words, the plaintiff's claim in prayer (c) could not be said to be plain and obvious. Similarly, the plaintiff's prayer (d) for post-rescissionary damages, being unquantified, would be a matter that had to be proved at the trial by way of a full hearing. (pp 32 h & 33 a-c)

[4] The plaintiff had succeeded in establishing that the defendant had no defence to his claim in prayers (a) and (b). However, the same could not be said of prayers (c) and (d), which were to proceed to full hearing at the trial. (p 33 d-e)

Case(s) referred to:

Cheah Khoon Tee v. Crimson Development Sdn Bhd [1999] 8 CLJ 79 HC ***(dist)***

Christina Angelina William Bastian & Anor v. Newacres Sdn Bhd [1996] 2 BLJ 509 HC ***(dist)***

Lim Sew Lan v. Pembangunan Hysham Sdn Bhd & Anor [1999] 4 CLJ 701 HC ***(refd)***

M-Concept Sdn Bhd v. Berjaya Square Sdn Bhd [2004] 4 CLJ 852 HC ***(refd)***

Nga Sheau Sheau v. United Merchant Finance Bhd [2004] 3 CLJ 243 HC ***(foll)***

Phileoalied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd [2003] 6 CLJ 344 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Contracts Act 1950, ss. 40, 56(1)
Rules of the High Court 1980, O. 81 r. 2(2)

For the plaintiff - Ang Beng Hoe; M/s Ang Beng Hoe & Co
For the defendant - Rohaya Hj Yaziz; M/s Raymond & Yeo

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (6) by way of summons in chambers filed by the plaintiff for summary judgment under O. 81 of the Rules of the High Court 1980.

A reference hereinafter to an order and a rule is a reference to that order and rule of the Rules of the High Court 1980, unless the context otherwise requires.

Factual Background

This is substantially uncontroverted. By a written agreement dated 14 September 1996 ("the agreement"), the plaintiff purchased a shoplot ("the property") from the defendant, a housing developer, at a price of RM590,800 ("the purchase price").

Pursuant to cl. 19(b)(i) of the agreement, the defendant was required to complete the construction and deliver possession of the property to the plaintiff within 48 months from a date a certain "condition precedent" was satisfied.

A reference to a clause hereinafter is a reference to that clause in the agreement.

Clause 3(a) defines "condition precedent" as the approval of building plans by the relevant authorities.

Clause 3(b) requires the developer to notify the plaintiff upon the satisfaction of the condition precedent, accompanied by the architect's certification. *Vide* notice dated 5 April 2002, the defendant notified the plaintiff that the condition precedent was satisfied on 18 December 1996 but without the accompaniment of the architect's certification.

Clause 7 makes time of the essence of the contract.

Until today, the defendant has still not completed the construction of the property despite the fact that the plaintiff as at 10 June 1999 had paid to the defendant a total sum of RM295,400 as progress payments towards the purchase price together with late payment interest of RM467.80 pursuant to cl. 6.

The defendant's statement of account shows that there was no outstanding payment due from the plaintiff to the defendant, the last payment invoice being dated 3 June 1999 for the fourth stage of progress under para. 2(c) of the third schedule to the agreement, and the defendant had not completed the fifth stage of progress under para. 2(d) thereof.

In accordance with cl. 19(b)(iii), in the event the defendant failed to deliver possession of the property by the completion date, the defendant has to pay agreed liquidated damages to be calculated from day to day at the rate of 10% per annum of the purchase price from the completion date until the date of delivery of vacant possession.

Despite numerous enquiries, the plaintiff was unable to obtain any satisfactory response from the defendant as to when the property would be delivered to the plaintiff and as to whether he could claim liquidated damages for the defendant's late completion. This led to the plaintiff's sending through his solicitors a written enquiry dated 6 May 2002.

Receiving no response from the defendant, the plaintiff sent a written notice dated 28 May 2002 requiring the defendant to deliver possession of the property by 31 July 2002, failing which the plaintiff would terminate the agreement and commence legal proceedings against the defendant. The defendant denied having received this notice.

Again receiving no reply, the plaintiff eventually by written notice dated 9 June 2003 informed the defendant that the agreement was deemed terminated through defendant's own repudiation. The defendant again denied having received this notice.

In the absence of any response from the defendant, the plaintiff has on 16 January 2004 filed this originating summons seeking, *inter alia*:

(a) a declaration that the plaintiff had rightly terminated the agreement or that the agreement had been rescinded through the defendant's repudiation as at 9 June 2003 or such other date as deemed appropriate by the court;

(b) refund of the sum of RM295,400 paid by the plaintiff by way of progress payments towards the purchase price;

(c) liquidated damages of RM146,000.43 being 10% interest on the purchase price as calculated from the completion date to the date of rescission; and

(d) post-rescissionary damages.

These prayers are cumulatively referred to as "the reliefs" which are also sought by the plaintiff in the instant application for summary judgment.

On 20 February 1997, the plaintiff executed an assignment in favour of Citibank Bhd ("Citibank") and notice of the absolute assignment has been duly given to the defendant and this was signified by the affixing of the defendant's common seal in the presence of two directors of the defendant in the absolute assignment itself.

On 4 June 2003, Citibank executed a deed of limited reassignment in favour of the plaintiff to institute legal proceedings.

The defendant has entered unconditional appearance and filed its defence.

The minutes of the plaintiff setting out the reliefs are attached to the summons in chambers apparently under O. 81 r. 2(2).

Locus Standi

Cik Rohaya bt Hj Yaziz, learned counsel for the defendant, referred to the assignment by the plaintiff to Citibank in which pursuant to cl. 4.01 read with cl. 2.02 thereof, the plaintiff has given Citibank an absolute assignment, as a result of which only Citibank has the *locus standi* to bring this action, relying on *Phileoalied Bank (M) Bhd v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621 FC; s. 4(3) of the Civil Law Act 1956; and *Christina Angelina a/p William Bastian & Anor v. Newacres Sdn Bhd* [1996] 2 BLJ 509 HC.

It was also argued for the defendant that the deed of limited reassignment dated 4 June 2003 given by Citibank to the plaintiff is unenforceable as the firm of solicitors Betty Chew & Co. stated therein were no longer the plaintiff's solicitors.

Mr. Ang Beng Hoe, plaintiff's learned counsel, responded that as the defendant has entered unconditional appearance, the defendant has effectively waived any irregularity in the proceedings and so is precluded from raising this preliminary objection. *Nga Sheau Sheau v. United Merchant Finance Bhd* [2004] 3 CLJ 243 was cited.

The answer to the defendant's preliminary objection has already been given by me in *Nga Sheau Sheau, supra*, where one of the issues for determination was whether the defendant, having entered an unconditional appearance, was precluded from raising the plaintiff's *locus standi* therein. At pp. 247h to 248a, I held as follows:

> In my judgment, it must be stated here that the defendant's desire to raise the preliminary objection pertaining to the plaintiff's *locus standi* must be preceded by the filing of a conditional appearance but the defendant has not done so. The challenge based on the plaintiff's *locus standi* is in effect grounded on the irregularity of the writ filed by the plaintiff.
>
> It is trite law that once the defendant has filed an unconditional appearance, as is the case here, the defendant has effectively waived any irregularity of the plaintiff's writ and so is precluded from raising a preliminary objection based on the plaintiff's *locus standi*: *The Avro International* [1988] 1 MLJ 147 at 149 CA Singapore, per Lai Kew Chai J.

Be that as it may, I shall also consider the merits of the defendant's submission. *Phileoallied Bank, supra*, cited for the defendant, does not concern any issue of *locus standi* at all.

In relation to s. 4(3) of the Civil Law Act 1956 from which the defendant seeks support, I am of the view that as the defendant has notice of the absolute assignment, and the provisions of s. 4(3) of the Civil Law Act 1956 have no doubt been complied with, the assignment shall be and be deemed to have been effectual in law.

In *Christina Angelina, supra*, referred to by the defendant, an absolute assignment was executed by the purchaser in favour of the bank which gave the loan to the purchaser for the purchase of a property. There was no reassignment by the bank to the purchaser to institute legal proceedings in the event of a breach by the developer. The purchaser instituted legal proceedings for, *inter alia*, late delivery but the developer raised the issue of the purchaser's lack of *locus standi* and it was upheld by the magistrate and Abdul Kadir Sulaiman J (now JCA) who held, *inter alia*, that the purchaser as assignor cannot maintain the action against the developer without joining the bank as co-plaintiff. On the facts there, with respect, I am of the view that the decision of the learned judge is correct.

However the facts before me show that there is a reassignment by the bank to the plaintiff, thereby putting the *locus standi* of the plaintiff herein on a very firm footing. I am therefore unable to find any merit in the defendant's submission.

Rescission

It was contended for the defendant that there was no fundamental breach on the part of the defendant and so the plaintiff could not rescind the agreement, but a contrary stand was presented for the plaintiff.

In my view, the question of whether there is a fundamental breach on the part of the defendant is to be determined by reference to the facts and circumstances of this case, which are in turn to be tested against the express provisions of the agreement, which have been adumbrated above.

The defendant's failure to deliver the property to the plaintiff within the time expressly stated to be of the essence clearly constitutes a fundamental breach of the agreement, which has brought about the defendant's repudiation of the agreement, thereby entitling the plaintiff to the remedy of rescission of the agreement. This is evident from the provisions of s. 56(1) of the Contracts Act 1950 which is reproduced as follows:

> 56(1) When a party to a contract (the defendant herein) promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promisee (the plaintiff herein), if the intention of the parties was that time should be of the essence of the contract. (words in bracket are mine)

A reference hereinafter to a section is a reference to that section in the Contracts Act 1950, unless the context otherwise requires.

Illustrations of fundamental breaches abound in the decisions of our courts.

In *Lim Sew Lan v. Pembangunan Hysham Sdn Bhd & Anor* [1999] 4 CLJ 701, where the plaintiff purchased a three-storey building from the defendant's development project in Setapak, Kuala Lumpur, in which recital C of the sale and purchase agreement highlighted that the development consisted of six blocks of five-to-seven storey shop office and service suites. However, the defendant scaled down the development to exclude the service suites and reduced the total floor space of the development by about one-half. RK Nathan J (as he then was) held, *inter alia*, that the defendant's breach of the agreement went to the root of the contract, entitling the plaintiff to terminate the agreement.

Where the plaintiff had entered into an agreement to purchase 1592 sq. ft. of property which was reduced by 122 sq. ft., as in *Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd* [2003] 6 CLJ 344, it was held by Abdul Malik Ishak J that the plaintiff was entitled to rescind the agreement.

In *M-Concept Sdn Bhd v. Berjaya Times Square Sdn Bhd* [2004] 4 CLJ 852, the sale and purchase agreement between the plaintiff purchaser and the defendant developer in respect of a commercial shop-lot provided that time was of the essence and that the defendant was to deliver vacant possession thereof to the plaintiff on or before 23 November 1998. The plaintiff had paid 90% of the total purchase price but the defendant was unable to deliver vacant on that date. The plaintiff sought a declaration that it be entitled to rescind the agreement. Hishamudin Yunus J held, *inter alia*, that:

> The inability of the defendant to deliver vacant possession of the shop-lot to the plaintiff for such an unreasonably lengthy period of time constituted a fundamental breach of the agreement, thereby entitling the plaintiff to rescind the agreement. Indeed, time was of the essence of the agreement, and the excessive delay on the part of the defendant had rendered the agreement voidable at the option of the plaintiff (Contracts Act 1950, s. 56(1)). This was so irrespective of the fact that the agreement did not contain a provision on rescission or the fact that the plaintiff was also entitled to claim liquidated damages for late delivery. (pp 855 e-h & 856 a).

Under s. 40, when a party to a contract such as the defendant herein has refused to perform, or disabled himself from performing, his promise in its entirety, the promise such as the plaintiff herein may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. I am of the view that s. 40 applies as the plaintiff has not signified his acquiescence in its continuance. On the contrary the plaintiff has by way of the final letter dated 9 June 2003 informed the defendant that the agreement was deemed terminated through defendant's own repudiation.

In *Cheah Khoon Tee v. Crimson Development Sdn Bhd* [1999] 8 CLJ 79, there were two applications for declaration that the respective sale and purchase agreement between the plaintiffs and the defendant in respect of two units of condominium had been properly terminated, and for the refund of all monies paid by the plaintiffs as well as for liquidated damages, interests and costs. The defendant failed to deliver the units on or before the delivery date ie, 28 April 1996, as a result of which the plaintiffs' solicitors sent letters to the defendant informing of their intention to terminate the agreements and claiming for the aforesaid reliefs.

However, the plaintiff's application was dismissed by Steve Shim J (now CJ Sabah & Sarawak) as:

1. the plaintiffs took some 18 months after knowing of the delivery date before deciding to terminate the agreement; and

2. no notice of any fresh limit had been given by the plaintiffs to the defendant and the defendant had continued with the construction works on the two units up to October or November 1997, well after the expiry of the completion date for delivery on 28 April 1996.

The learned judge held that the plaintiffs have waived their rights to rely on time being of the essence of the agreement and are therefore estopped from terminating or rescinding the agreements.

The facts there are distinguishable from the narrative of facts before me. That being the case, I am of the view that *Cheah Khoon Tee, supra*, is not supportive of the defendant's contention. In the circumstances, I hold that the plaintiff is entitled to rescind the agreement.

Damages

The plaintiff has included liquidated damages and post-rescissionary damages in the instant application for summary judgment.

Bundles of authorities had been prepared, on the one hand, by plaintiff's counsel to establish the claim, and on the other hand, by defendant's counsel to demolish it, for whose enormous efforts respectively I record my commendation.

On my part,, in order to comprehend the ambit of O. 81 invoked for the plaintiff, the relevant portion merits reproduction as follows:

> O. 81 r. 1(1)
>
> In any action begun by writ indorsed with a claim
>
> (a) … for specific performance of an agreement (whether in writing or not) for the sale, purchase … of any property, with or without an alternative claim for damages; or
>
> (b) for rescission of such an agreement;
>
> (c) …
>
> the plaintiff may, on the ground that the defence has no defence to the action apply to the court for judgment.

A cursory reading of prayer (c) of the reliefs sought by the plaintiff shows a sum of RM146,300 quantified as liquidated damages, being 10% on the purchase price and not on the sum of RM295,400 actually paid by the plaintiff to the defendant. Bearing in mind that the instant application is for summary judgment which is only to be entered in the absence of a triable issue, or

where the plaintiff's claim is plain and obvious, I am of the view that the plaintiff's quantification of liquidated damages based on the entire purchase price is highly arguable as the plaintiff has not effected payment thereof but merely RM295,400 which is 50% of it.

Whether or not the plaintiff is entitled to claim 10% interest on the entire purchase price when he has only paid half of it is clearly a triable issue. In other words, the plaintiff's claim in prayer (c) cannot be said to be plain and obvious.

Similarly, the plaintiff's prayer (d) for post-rescissionary damages, being unquantified, would be a matter which has to be proved at the trial by way of a full hearing requiring a mature consideration of *viva voce* evidence which must in turn be assessed and evaluated after the process of cross-examination and re-examination of the witnesses called by the parties.

Conclusion

On the foregoing grounds, I hold that the plaintiff has succeeded in establishing that the defendant has no defence to his claim for rescission of the agreement under prayer (a) and also his claim for the refund of RM295,400 paid by the plaintiff to the defendant pursuant to prayer (b) of the reliefs, together with interest at 8% per annum with effect from 9 June 2003 until the date of realisation.

However, I am unable to say the same for prayers (c) and (d) which are therefore to proceed to full hearing at the trial.

Costs

On the question of costs, having regard to the submissions of the counsel for both parties respectively, and summary judgment has been entered for only two out of four prayers sought by the plaintiff, the positions of the parties herein are placed in equilibrium, as a result of which the fair and reasonable order is that the parties are to bear their own costs, which I hereby order.